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No. 06-315

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In the Supreme Court of the United States

HILLSBOROUGH COUNTY, FLORIDA,
Petitioner,

v.

KENNETH L. BURTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

RESPONDENTS' COUNTER-STATEMENT OF FACTS AND QUESTION PRESENTED

This case was brought by the Respondents pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (FLSA) to recover unpaid overtime compensation. The issue in contention is the compensability of time spent traveling in vehicles assigned to the Respondents ("County Vehicles") by the Petitioner, Hillsborough County, Florida (hereafter "the County"). Respondents were assigned these County Vehicles to perform their job duties. Respondents were not permitted to drive the County Vehicles to their homes. Instead, each day the Respondents were required to drive their personal vehicles to secured County-owned parking facilities ("Secured Parking Facilities") to retrieve their County Vehicles before continuing to their job sites. At the end of each day, they were required to return the County Vehicles to the Secured Parking Facilities and drive their personal vehicles home. Respondents' claims arise from the uncompensated time driving their County Vehicles between the Secured Parking Facilities and their job sites (no compensation is sought for the time spent commuting in their personal vehicles between parking sites and the Respondents' homes).

Petitioner, Hillsborough County, Florida frames the issue in this case as follows:

> Whether under the Portal-to-Portal Act, as amended by the Employee Commuting Flexibility Act of 1996 ("ECFA"), an employee's time spent commuting to the job

> site in an employer-issued vehicle is not-compensable even though the employer required the vehicle to be parked overnight at a secure parking lot.

This is a gross misstatement of the legal issue involved in this case. The Portal-to-Portal Act and the ECFA are merely amendments to the statute this case was brought under, the FLSA. Thus, to frame the issue as arising under these amendments, rather than the FLSA itself, is incorrect.

The issue in this case is whether the task of transporting assigned County Vehicles between the County's Secured Parking Facilities and the Respondents' job sites was integral and indispensable to the Respondents' jobs, and therefore compensable under the FLSA. The Eleventh Circuit found that this task was integral and indispensable and, therefore, compensable.

GROUNDS TO DENY THE PETITION

I. The Eleventh Circuit's Ruling Does Not Conflict With Any Other Circuit Court Decision

The County asserts that the Eleventh Circuit's decision conflicts with the holdings of several other Circuits. This is incorrect. Each of the decisions identified by the County presented factual scenarios that materially differ from those presented in the case at bar. To the extent that these decisions and the case at bar are similar (they all involve the general issue of travel time), they are not inconsistent at all. Rather, collectively, they merely provide examples of the well-established principal that activities (including travel) that are integral and indispensable to an employee's job are compensable, while those that are not may be excluded from

compensable time pursuant to the Portal-to-Portal Act. See Steiner v. Mitchell, 350 U.S. 247, 256, 76 S.Ct. 330, 100 L.Ed. 267 (1956) (discussing the "integral and indispensable" standard).

The Eleventh Circuit found that the travel time involved in this case was "integral and indispensable" to the Respondents' jobs because transporting the County Vehicles to and from the Secured Parking Facilities was necessary to fulfill the County's mandate that the County Vehicles be secured on County property each night. None of the Circuit decisions cited by the County involved factual scenarios that were materially similar to the case at bar. Rather, these cases fall into three categories that are distinguishable from the Eleventh Circuit's Opinion.

A. "Home-to-Work" Cases

The majority of the cases relied upon by the County are merely examples of decisions holding that commutes between home-and-work are not compensable. Kavanagh v. Grand Union Company, 192 F.3d 269, 271 (2d Cir. 1999) (ruling claim for hours plaintiff spent driving "between his home and the Grand Union stores at which he performed mechanical services."); Imada v. City of Hercules, 138 F.3d 1294, 1295 (9th Cir. 1998) (holding that FLSA does "not require compensation for travel time from home to a site where an employee is to perform essential parts of the activities the employee has been hired to perform); Raczkowski v. TC Construction Company, 8 F.3d 29 (9th Cir. 1998) (Unpublished) (holding that "driving the company truck between home and work" was not compensable); Spencer v. Office of the Auditor of Public Accountants, 928 F.2d 405 (6th Cir. 1991) (Unpublished) (involving home to work commute); Bartlomain v. United States Postal Service, 870

F.2d 657 (6th Cir. 1989) (Unpublished) (addressing policy that set guidelines for compensation of time spent commuting "between a work station and the employee's residence").

As the Eleventh Circuit clearly stated, "this case does not involve home-to-work travel." Appendix to Petition for Writ of Certiorari (hereafter "Appendix"), p. 11a. Rather, it involves travel time between County Secured Parking Facilities and worksites. Unlike the employees in the cases cited above, the Respondents herein were not permitted to drive from home to work in their assigned County Vehicles. Therefore, these cases do not conflict with the Eleventh Circuit's decision. Rather, they involved materially different factual circumstances.

B. "*De Minimus* Interruption of Home-to-Work Commute" Cases

Three of the cases cited by the County, Bobo v. United States, 136 F.3d 1465 (Fed. Cir. 1998), Aiken v. City of Memphis, 190 F.3d 753 (6th Cir. 1999), and Reich v. New York City Transit Authority, 45 F.3d 646 (2d Cir. 1995), likewise involved home-to-work commutes. The added factor presented by these cases was that the employees in these cases transported canines on their commutes, and alleged that they occasionally had to stop due to dog-care activities. Bobo, 136 F.3d at 1467; Aiken, 190 F.3d at 757-58; Reich, 45 F.3d at 651. In all three cases, the Circuit courts found that the interruptions met the definition of compensable activities, but were *de minimus*. Bobo, 136 F. 3d at 1468; Aiken, 190 F.3d at 758; Reich, 45 F.3d at 652-53.

While the County ignores the distinctions between these decisions and the case at bar, they are readily apparent. These cases involved situations in which employees, unlike

the Respondents herein, were permitted to drive their employer-owned vehicles to their homes. As a result, the stops made to attend to their canines were merely occasional, sporadic and brief pauses along a normal home-to-work commute route. By contrast the Respondents herein were not permitted to drive their County Vehicles home and, as a result, were required – each day – to take substantial detours to retrieve their County Vehicles from, and then to return them at the end of the day to, the Secured Parking Facilities. Appendix, pp. 16a-17a. The Respondents drove as much as forty-five (45) minutes, each way, to accomplish the necessary task of transporting their County Vehicles between the Secured Parking Facilities and the job sites. Appendix, pp. 13a, 16a-17a. Thus, in holding that the *de minimus* rule did not apply to the case at bar, the Eleventh Circuit in no way conflicted with the legal rulings of the Federal, Second, or Sixth Circuits.

C. Voluntary Detour Cases

The remaining cases cited by the County involve situations in which the employees' commutes were interrupted by detours that the employees themselves elected to undertake. For example, in Baker v. GTE North Incorporated, 110 F.3d 28 (7th Cir. 1997), the employees were provided vehicles by their employer but, unlike the Respondents herein, were permitted to drive these vehicles home. While most did so, the plaintiff "decided, for reasons of personal convenience, not to do so" but, instead, to leave the car at a location near his home. Id. at 31. The Court held under these limited circumstances, that the plaintiff could not convert a normal home-to-work commute to compensable time merely by virtue of his voluntary decision not to drive the vehicle to his home. Id.

Similarly, in United Transportation Union Local 1745 v. Alburquerque, 178 F.3d 1109 (10th Cir. 1999), the respondents were bus drivers who were compensated from the time their route started, but sought additional compensation for time riding a shuttle between a garage and the location where their shift began. The shuttle ride was entirely voluntary, as employees only obligation was to "arrive on time at his or her starting point for a shift." Id. at 1113. Thus, employees could commute to the garage or to the starting point of their route – it was entirely their choice. Under these circumstances, the shuttle ride was found to be non-compensable.

Finally, in Vega v. Gasper, 36 F.3d 417 (5th Cir. 1994), the employees were given the option of driving directly to their worksites or riding a bus provided by the employer. Because the bus ride was entirely voluntary, the Court found it was not compensable. Id. at 425.

Unlike these cases, the Respondents' job responsibilities rendered the task of retrieving the County Vehicles mandatory, as the Eleventh Circuit stated:

> Ultimately, the employees who used the county vehicles had no choice but to begin and end their work day not at a work site, but at a county parking facility. And without the county vehicles the employees could not perform the principal activities for which they were employed – driving throughout Hillsborough County and inspecting public works construction sites.

Appendix, p. 13a. Thus, because the travel at issue herein was the product of "an employer's mandate or job

requirement," rather than a mere voluntary choice made by the employees, the Eleventh Circuit's decision is distinguishable from, and does not conflict with, the Fifth, Seventh and Tenth Circuit's decisions cited by the County.

II. This Appeal Does Not Present An Important Federal Question Worthy Of Discretionary Review

Supreme Court Rule 10, in describing the circumstances in which certiorari may be warranted, stresses review is typically granted only in cases that that present "important federal questions." The County's Petition makes no effort whatsoever to explain how the narrow issue presented in this case might constitute an important question that would compel review by the Supreme Court.

The factual scenario underlying this case is unusual and unique. Certainly, many employers provide their employees with vehicles to use in the course of performing their job duties. In some instances, the vehicles remain at the job site, while in others, the employees also use the vehicles to commute to and from their job sites. However, this case presents neither of these common scenarios, as the Respondents could neither drive the County Vehicles home nor could they leave them at their job sites. Rather, they were required to transport the County Vehicles to an intermediate location – the County-owned Secured Parking Facilities. The County's Petition offers no evidence showing, nor does it even assert, that this type of policy is common among employers, thereby warranting Supreme Court consideration of the FLSA ramifications of this practice.

Cases of this type do not merit Supreme Court review, as Justice Tjoflat of the Eleventh Circuit aptly remarked in a recent case discussing the standards for granting certiorari:

> Another major reason why the Court will frequently deny certiorari in a case is if the legal dispute is fact-bound-that is, if it arises from a unique constellation of facts unlikely to frequently rise again.

Allapattah Services, Inc. v. Exxon Corporation, 362 F.3d 739 (11th Cir. 2004) (dissenting opinion); see also Stewart A. Baker, Symposium on Supreme Court Advocacy: A Practical Guide to Certiorari, 33 Cath. U. L. Rev. 611, 616 (1984) ("the Court's job is to make law... [Lower courts] cannot be brought into line by a Supreme Court decision that turns exclusively on the facts of one particular case.").

Thus, as this case involves a fact-specific ruling addressing matters that lack the element of public importance and are not likely to arise again with any regularity, certiorari should be denied.

III. The County's Bare Assertion That The Eleventh Circuit's Ruling Was Incorrect Is Not A Sufficient Basis To Grant Certiorari. Moreover, The County Ignores Recent Supreme Court Precedent That Is Consistent With The Eleventh Circuit's Ruling

Section B of the County's Petition argues that the Eleventh Circuit's ruling was incorrect. This assertion does not provide a basis for the Supreme Court to grant certiorari. Simply stated, every petitioner believes that the lower court ruled incorrectly, but that does not entitle all of them to obtain Supreme Court review.

Furthermore, in making this assertion and, in fact, throughout the Petition, the County fails to note that the Supreme Court recently confirmed, consistent with the

Eleventh Circuit's ruling, that travel time occurring after an integral and indispensable task is performed is compensable time under the FLSA. IBP, Inc. v. Alvarez, 126 S.Ct. 514, 163 L.Ed. 2d 288 (2005).[1]

Therefore, Section B of the County's Petition does not provide any basis for this Court to grant certiorari in the case at bar.

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[1] Notably, both the Eleventh Circuit below and this Court in Alvarez relied on the same regulation, 29 C.F.R. § 785.38, in reaching this conclusion.

CONCLUSION

For the foregoing reasons, the County's Petition for writ of certiorari should be denied.

Respectfully submitted,

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* Admission pending (applied for on September 19, 2006)

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